No. 96-1466

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1996

LEGEON INC., *et al.*,

Petitioners,

v.

MELBERG WEISS BERSHAD HYMES & LERACH, A PARTNERSHIP, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF *AMICI CURIAE* OF AMERICAN COUNCIL OF LIFE INSURANCE, THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF *AMICI CURIAE* OF AMERICAN COUNCIL OF LIFE INSURANCE, THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI

The *amici* are trade associations representing the interests of many of the life and property and casualty insurers in the United States.[1] Specifically, the American Council of Life Insurance is the largest life insurance trade association in the United States, representing the interests of more than 580 member life insurance companies. These companies currently underwrite 90.9 percent of the life insurance in force in the United States.

The National Association of Mutual Insurance Companies (hereinafter "NAMIC") is a national trade association representing the interests of nearly 1200 property and casualty insurance companies that range from among the largest to the smallest in North America. NAMIC is the largest property and casualty trade association in North America, both in number of member companies and the amount of business underwritten. Together NAMIC member

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1 Counsel for both the petitioners and the respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

Pursuant to Rule 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and no person or entity, other than *amici* and their members, made a monetary contribution to the preparation or submission of this brief.

companies underwrite approximately 30% of the property and casualty insurance business in the United States.

The American Insurance Association (hereinafter "AIA") is a national trade association representing more than 300 companies writing property and casualty insurance in every state and jurisdiction of the United States. AIA maintains seven regional offices, and retains legislative counsel in every state. AIA member companies underwrite $58 billion a year in direct written premiums. AIA members hold 48% of the country's market share for commercial multi-peril coverage and 39% of the products liability insurance.

The *amici* have a significant interest in the resolution of the question presented by this case. Their members have been and will be parties to complex, multi-forum legal disputes subject to transfer under 28 U.S.C. § 1407(a). In addition, members of the *amici* insure other individuals and entities that have been and will be parties to cases transferred under section 1407(a), and therefore have been and may be required to indemnify these parties for their liability and/or for the costs of defense. Indeed, in practice, both the underlying liabilities and the costs of litigation in complex multi-forum disputes often are ultimately borne by insurers such as the members of the *amici*. Accordingly, both as parties to litigation and as insurers of parties, members of the *amici* have an interest in the fair and efficient resolution of cases transferred under section 1407(a), and thus support the existing practice of allowing transferee judges the discretion to conduct consolidated trial and post-trial proceedings in appropriate cases.

SUMMARY OF ARGUMENT

As respondents demonstrate, the relevant statutory language and legislative history supports the authority of

multidistrict litigation ("MDL") transferee judges to consider and rule upon motions made pursuant to 28 U.S.C. § 1404(a), and thereby to determine whether MDL cases should be consolidated for trial and post-trial purposes. *Amici* will not repeat those arguments here. Instead, this brief will address two points: (1) that consolidation of MDL cases for trial and post-trial purposes can have significant efficiency and fairness benefits; and (2) that such consolidation does not impinge upon any legitimate interest plaintiffs have in their choice of forum.

Sixty-five years ago, prior to the age of massive multi-forum litigation, Professor Chafee recognized that fewer lawsuits sometimes can do greater justice than more lawsuits:

> The King of Brobdingnag gave it for his opinion that, "whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together." In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before.

Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297 (1932).[2]

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[2] The subject of Prof. Chafee's article was the "bill of peace in equity," a mechanism by which "[q]uestions of law or fact which would otherwise be tried over and over can . . . be determined once for all in a single proceeding." *Id.* According to Prof. Chafee, "[t]his avoidance of multiplicity of suits saves the parties from needless expense and vexation, economizes the

For the past 30 years, the MDL system, as implemented by the Judicial Panel on Multidistrict Litigation ("JPML") and the district court judges to whom the JPML has transferred MDL cases, has been such a benefactor of justice, efficiently and fairly resolving approximately 60,000 individual lawsuits through a far smaller number of consolidated proceedings. *Judicial Business of the United States Courts: 1996 Report of the Director* at 29. The majority of these lawsuits have been resolved without the necessity for trial. A small number of these lawsuits, however, have required trials on the merits and post-trial proceedings, and in some portion of such cases these trials and post-trial proceedings have been conducted by transferee judges, either by consent of the parties or because of rulings on section 1404(a) motions. Undoubtedly, in appropriate cases the consolidation for trial and post-trial purposes of MDL cases can have substantial efficiency and fairness benefits, conserving the valuable resources both of the parties and the federal judicial system, resolving cases more quickly, and at the same time avoiding inconsistent results. No one, including petitioners, seriously disputes the enormous benefits that can flow from such consolidation. Indeed, the MDL system -- a system conceived of and implemented by some of this nation's most respected jurists -- has operated so well and so fairly that it has required virtually no supervision by the federal appellate courts in its almost 30 years of existence.

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time of judges and jurymen, and frees the dockets for the affairs of other litigants." *Id.* Much the same can be said for consolidation of cases for trial and post-trial purposes under the current MDL system, and indeed has been said, as discussed below in Part I of the Argument.

In the face of the impressive track-record of the MDL system and the acknowledged benefits of consolidation, petitioners attack the subjective motives of the district court judges that are hand-picked by the JPML to preside over MDL cases. Supported by the views of only a single federal court judge, Judge Kozinski, petitioners contend that the MDL system somehow deprives plaintiffs of their "choice of forum" because transferee judges allegedly develop "proprietary feelings" towards the MDL cases assigned to them, and express these feelings by systematically making incorrect rulings on section 1404(a) transfer motions. *See* J.A. at 58; Pet. Br. at 11.

This approach to the question presented is more akin to psychoanalysis than legal analysis. The notion that transferee judges have used section 1404(a) to engage in an illegitimate power grab is not supported by anything in the record before this Court. Moreover, the available statistical evidence and the decisions of transferee judges themselves demonstrate that transferee judges are fully capable of rendering fair and correct rulings on section 1404(a) motions, and that transferee judges frequently relinquish control of MDL cases and return them to the transferor courts in which they originally were filed.

Once the myth of the "conspiracy of the transferee judges" is put to rest, petitioners' purported policy arguments crumble. While it is true that plaintiffs generally have *some* interest in having their claims tried in their chosen federal district, this interest does not rise to the level of an unqualified right. As this Court has made clear, a plaintiff can be required to try its claim in some other district where venue is proper if the plaintiff's interest in its chosen forum is outweighed by other equally legitimate interests, including the interest of judicial economy. This is the balancing process in which a district court judge is required to engage

when ruling upon a section 1404(a) motion. Although plaintiffs have an interest in having *some* Article III judge engage in this balancing, plaintiffs have no legitimate interest in having it done by any *particular* Article III judge. And in the MDL context, an Article III "transferee" judge often is better equipped to engage in this balancing process than an Article III "transferor" judge. Thus, whatever legitimate interest plaintiffs have in their choice of forum is fully protected by the MDL system as it has always operated.

ARGUMENT

I

TRANSFEREE COURTS MUST BE PERMITTED TO CONSIDER AND RULE UPON SECTION 1404(a) MOTIONS IN ORDER TO ACHIEVE THE FULL EFFICIENCY AND FAIRNESS BENEFITS OF THE MDL SYSTEM

A. Consolidation Of MDL Cases Before A Single Court For Purposes Of Trial And Post-Trial Proceedings Can Have Substantial Efficiency And Fairness Benefits

In the almost 30 years since the enactment of section 1407, the MDL system has been a remarkable success. The JPML -- a panel of some of the nation's most distinguished and experienced jurists designated by the Chief Justice pursuant to section 1407(d) -- has transferred approximately 100,000 individual lawsuits for coordinated or consolidated pretrial proceedings, for an average of over 3,000 lawsuits per year. *Judicial Business of the United States Courts: 1996 Report of the Director* at 29. These 100,000 individual

lawsuits have been consolidated into 737 MDL matters, for an average of 136 individual cases per MDL matter.[3]

The legal disputes that receive MDL treatment are among the most difficult to resolve and most expensive to litigate. They are the types of legal disputes that, in the absence of MDL treatment, could bankrupt the parties solely through the cost of litigation, lead to inconsistent and inequitable results, overrun the dockets of the federal courts and, because of the delay engendered, deprive deserving plaintiffs of any recovery for extended periods of time.[4] For

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[3] *Amici* have lodged with the Court ten copies of an August 11, 1997 printout of the "Multidistrict Automated Tracking System -- Citations Summary," a computerized database maintained by the JPML and publicly available from the JPML Clerk's office. This document lists the cases which have been assigned "MDL" matter numbers by the JPML, and for each such matter number indicates the caption of the matter, what actions have been taken by the JPML with respect to that matter, what type of litigation the matter relates to, and -- for cases transferred under section 1407(a) -- the transferee court and judge. According to this document, the JPML has consolidated cases by granting section 1407 motions to transfer in 737 MDL matters, and has refused consolidation by denying such motions in 300 matters.

[4] Numerous commentators have recognized the enormous costs and inequities that may result from uncoordinated complex multi-forum litigation. *See, e.g.*, William W. Schwarzer, Alan Hirsch & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 Tex. L. Rev. 1529, 1530 (1995) ("[A]ll large-scale litigation has one common consequence: duplicative activity that wastes scarce resources, clogs court dockets, causes delays, and often produces divergent decisions on nearly identical claims, leading to frustration of victims' rights to compensation, excessive transaction costs, and unfairness and uncertainty."); American Law Institute, *Complex Litigation:*

example, among the largest cases handled by the MDL have been the multi-district disputes concerning, *inter alia*, "Agent Orange" (MDL No. 381), the "Dalkon Shield" (MDL No. 211), and silicon breast implants (MDL No. 926) -- cases that in the absence of MDL treatment threatened to bury the dockets of the federal district courts.

Scholars and other commentators have offered unanimous praise for the MDL system, and the substantial fairness and efficiency benefits attributable to MDL consolidation. *See, e.g.*, Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and*

Statutory Recommendations and Analysis at xviii (1994) (hereinafter ALI, *Complex Litigation*) (foreword of Prof. Hazard, stating that "[i]t is common ground that these types of litigation involve extraordinary burdens on the court systems, both federal and state; high 'transaction costs' in the form of lawyer's fees and related expenses; and serious risk of inconsistent dispositions of claims by claimants who are similarly situated"); *id.* at 16-17 ("[T]he most striking problem caused by complex litigation is its enormous cost. That cost cannot be measured precisely, but every indication is that it is staggering."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099 (1987) ("[T]he expense of mass tort litigation, which commonly involves dozens of closely related lawsuits brought by citizens of many states, has reached staggering levels. The cost of litigating these claims often exceeds the sums that are ultimately paid to plaintiffs."); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7, 15 (1986) ("The problems [posed by multiforum complex litigation] are many," and include "dangers of bankruptcy of a defendant after several large judgments but before other plaintiffs' claims can be satisfied, and possible unfairness in connection with multiple awards of punitive damages," as well as "delay and additional expense for the parties.").

in Multidistrict Litigation, 135 U. Pa. L. Rev. 595, 596 (1987) (The JPML "has been functioning effectively for almost 20 years. Indeed, 'multidistrict consolidation for pretrial proceedings has become an essential factor in the federal courts' ability to carry their increasing burden of complex litigation.'") (citation omitted); David F. Herr, *Multidistrict Litigation* at xix (1986) ("The result of the Panel's activities has been litigation that is both more manageable by the courts and more expeditiously resolved for the litigants."); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 585 (1978) ("Through creative use of their broad powers, transferee judges have developed salutary solutions to many of the staggering problems associated with complicated and intricate multidistrict litigation. In so doing, transferee judges have contributed immeasurably to the public welfare and to the capacity of the federal judiciary to carry its ever increasing burden of litigation.").

Although a dispute has arisen among scholars and commentators (although not, until Judge Kozinski's dissent below, within the federal judiciary) concerning whether transferee judges have statutory authority to consolidate MDL cases for trial and post-trial purposes pursuant to section 1404(a), there is widespread *agreement* that in appropriate circumstances the consolidation of MDL cases for trial and post-trial purposes can have enormous practical benefits. *See, e.g.*, Schwarzer et al., *supra* note 4, at 1535 (precluding transferee court from consolidating cases for trial "bar[s] [the court] from invoking an effective procedure -- the early severance and consolidated trial of threshold and potentially dispositive issues common to the litigation."); Blake M. Rhodes, Note, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Pa. L. Rev. 711, 731 (1991) ("The 1407-1404(a) combination did not develop

arbitrarily and parties do not consent to trial in the transferee forum capriciously. Trial in the transferee court is ordered or consented to because it promotes efficient judicial administration and/or is in the interest of litigants. Certainly consolidated trial of every multidistrict litigation is not warranted, but it is often advantageous, and on occasion imperative."); Conway, *supra* note 4, at 1103 (consolidation for trial "fosters fairness in adjudication by promoting consistent results in related case" and "enhances judicial economy by eliminating the delay and duplication of effort that would result if each transferred case were remanded to its original district for trial."); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv. L. Rev. 1001, 1033 (1974) ("When there are substantial common issues, consolidated trial produces economy for the parties and the courts, utilizes the expertise of the transferee judge, and guarantees consistent results."); Herr, *supra*, at 213 ("One very important means of resolving transferred cases in the transferee court is transfer of the cases to that court for trial.").

The significance of consolidation through the use of section 1404(a) goes beyond merely the question of where the trial or trials of the consolidated cases will take place. Keeping related cases in a central forum for trial, post-trial proceedings, and appeal significantly increases the likelihood of resolution through settlement during each of these phases. As most MDL cases involve multiple claims against a single defendant or group of defendants, a settlement that does not bankrupt the defendants and that equitably distributes any payments to the many claimants often can be achieved only through a centralized negotiation process. Dispersal of such cases back to numerous different forums makes negotiated global resolutions significantly more difficult to achieve, thereby delaying and increasing the transaction costs of such resolutions.

Thus, the benefits to both parties and the judicial system of consolidation of MDL cases -- including consolidation for trial and post-trial purposes -- are significant and undisputed. Indeed, even petitioners recognize "the benefits of transfers for all purposes, including trial." Pet. Br. at 29.

B. Contrary To Petitioners' Suggestion, These Efficiency And Fairness Benefits Cannot Be Obtained Unless Transferee Courts Are Permitted To Consider And Rule Upon Section 1404(a) Motions

Petitioners contend that the admitted "benefits of transfers for all purposes, including trial," can be achieved even if transferee courts are not permitted to consider and rule upon section 1404(a) motions. Pet. Br. at 29. Petitioners suggest that these same benefits can be achieved merely by "ask[ing] the district court where the case was filed for a section 1404 transfer for all purposes, including trial." *Id.* This suggestion, however, ignores the realities of multi-district litigation.

The typical MDL case begins with the filing of numerous similar lawsuits (usually raising nearly identical allegations of tortious conduct against a common defendant or group of defendants) in numerous different judicial districts, where they are assigned to numerous different judges. Any attempt to have these cases consolidated before a single judge -- other than through the MDL process -- raises usually insurmountable collective action problems. Such an attempt would require the coordinated filing by litigants in each of the numerous cases of section 1404(a) motions seeking transfer to a single agreed-upon district. All of the motions would then need to be granted by the numerous different judges before whom they were filed. Such a process easily could break down at either step due to

a lack of cooperation among the parties or a lack of coordination among the judges.

Outside of the MDL context, such a substantial coordinated effort has been attempted only once in the history of the federal judiciary, in the *Electrical Equipment* cases. But even in that instance, the coordination was not brought about voluntarily by the parties or the judges before whom the cases initially were brought. Rather, the coordinated granting of section 1404(a) motions occurred only under the centralized leadership of the Co-Ordination Committee on Multiple Litigation appointed by Chief Justice Warren. *See* H.R. Rep. No. 90-1130 (1968), *reprinted in*, 1968 U.S.C.C.A.N. 1898, 1899; *Hearings on H.R. 8276 Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 21-22 (1966).

In reality, the consolidation of MDL cases before a single court for trial and post-trial purposes cannot be achieved through the making of numerous section 1404(a) motions in numerous different district courts. Indeed, under the new regime offered by petitioners as a substitute for the system that has been used for three decades, at some point prior to trial, all of the cases consolidated pursuant to section 1407 -- sometimes numbering in the thousands -- would have to be remanded to a multitude of district courts around the country. In order to have a consolidated trial, the parties in each of these many cases would then have to make separate section 1404(a) motions in the respective transferor courts. Those transferor courts would not have been involved in other pretrial proceedings, such as discovery and dispositive motions, would not be familiar with other cases that had been part of the MDL consolidation and therefore likely would be ill-equipped to decide whether consolidation for trial makes sense and is permissible under section 1404(a). And, while some transferor judges might decide that a

section 1404(a) transfer and consolidation for trial is appropriate, others might reject that position, defeating the whole notion of consolidation of all similar cases into one unitary proceeding.

In contrast,, the transferee judge who handled the consolidated pretrial proceedings is perfectly positioned to decide the pretrial issue whether section 1404(a) transfers of the consolidated cases to a single court for purposes of trial and post-trial proceedings is in the "interest of justice." *See Lykes Bros. S.S. Co. v. Sugarman*, 272 F.2d 679, 680 (2d Cir. 1959) (question whether to grant section 1404(a) motion is "peculiarly one for the exercise of judgment by those in daily proximity to these delicate problems of trial litigation").

In short, consolidation for trial of multi-district litigation can be achieved only if transferee courts are permitted to consider and rule upon section 1404(a) motions. If this Court accepts petitioners' arguments, and deprives transferee courts of the ability to consider and rule upon section 1404(a) motions, then the significant benefits that flow from the consolidation of MDL cases for trial and post-trial purposes will be unobtainable.

II

PERMITTING TRANSFEREE COURTS TO CONSIDER AND RULE UPON SECTION 1404(a) MOTIONS DOES NOT IMPINGE UPON ANY LEGITIMATE INTEREST PLAINTIFFS HAVE IN THEIR CHOICE OF FORUM

A. Plaintiffs' Choice Of Forum Is Not A Dispositive Factor In Section 1404(a) Transfers, And Legitimately Can Be Outweighed By Interests Of Efficiency And Judicial Economy

Judge Kozinski, in his dissent below, argues that the granting by a transferee judge of a section 1404(a) motion has the effect of "denying plaintiffs the right to trial in their forum of choice." J.A. at 57. He suggests that Congress may have "thought it unfair to deny [plaintiffs] control over the place of trial [.]" J.A. at 68. And in a particularly colorful passage, he contends that "MDL courts are applying a mutated version of section 1404(a), one where a plaintiff's right to pick its venue has devolved to the significance of a tailbone or an appendix." J.A. at 71. Petitioners echo these sentiments. *See* Pet. Br. at 11-12. Thus, petitioners' arguments depend in large part upon the assertion that plaintiffs have a "right" to their chosen forum that cannot legitimately be overcome by considerations of efficiency and judicial economy. *See* Pet. Br. at 20 n.6 ("But section 1404(a), unlike section 1407(a), does not recognize judicial efficiency as a basis for a transfer. It is therefore a perversion of congressional intent to use the former to expand the later."). This assertion is demonstrably incorrect.

It is well established that plaintiffs do not have an unqualified "right" to have their claims tried in the federal

district in which those claims initially are brought. Indeed, the primary purpose of section 1404(a) is to permit transfers *even if* the plaintiff has chosen an appropriate forum. *See Ex Parte Collett*, 337 U.S. 55, 58 (1949) ("Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfers to a more convenient forum, even though the venue [of the original forum] is proper.") (*quoting* 28 U.S.C § 1404 revision notes). The "remedial purpose" of section 1404(a) is to permit "the individualized, case-by-case consideration of convenience and fairness[.]" *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964). And as this Court has recognized, district courts have broad discretion under section 1404(a) to transfer actions when the plaintiff's choice of forum is outweighed by other interests. *Norwood v. Kirkpatrick*, 349 U.S. 19, 26 (1955) ("This is not to say . . . that the plaintiff's choice of forum is not to be considered, but only that the [district court's] discretion to be exercised is broader.").[5]

Among the interests that may, for purposes of a section 1404(a) motion to transfer, outweigh the plaintiff's interest in its chosen forum is the interest of judicial economy. Indeed, in *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 26 (1960) -- a case decided prior to the enactment of section 1407 -- this Court approved the use of section 1404(a) to consolidate before a single judge cases

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5 In an analogous context, this Court held that even where *both* parties select a particular forum -- through the use of a contractual forum-selection clause -- a district court may order transfer to a different forum, and in so doing must "weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988).

originally filed in different districts that could more efficiently be tried together:

> To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.

"[T]he desire to avoid multiplicity of litigation from a single transaction" is an element that district courts properly may consider in determining whether a section 1404(a) transfer is "in the interest of justice." 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3854 at 439-41 (2d ed. 1986). Indeed, the lower federal courts have recognized, even outside of the MDL context, that "related litigation should be transferred [pursuant to section 1404(a)] to a forum where consolidation is feasible." *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 221 (7th Cir. 1986); *see also International Tel. & Tel. Corp. v. General Tel. & Elecs. Corp.*, 527 F.2d 1162, 1164 (4th Cir. 1975) (Where antitrust action filed in North Carolina related to antitrust action pending in Hawaii, "[j]udicial efficiency and economy suggest a transfer so that, if a violation of the antitrust laws is found, all appropriate relief may be granted in one action.").

In sum, plaintiffs do not have a "right" to have their claims tried in the federal district court in which such claims originally are filed. Rather, a plaintiff's choice of forum is merely one interest that a district court considering a section 1404(a) motion may consider. And the interest in preserving a plaintiff's choice of forum may, pursuant to the explicit text of section 1404(a), be outweighed by "the interest of justice," an interest that includes the efficient resolution of multi-district litigation through consolidation of related cases for

trial and post-trial purposes. Accordingly, the use of section 1404(a) to consolidate related cases for trial and post-trial purposes, even at the expense of plaintiffs' choice of forum, is appropriate and clearly within the discretion of a district court judge.

B. The Accusation Leveled By Petitioners And Judge Kozinski That, Because Of Their Alleged "Proprietary Feelings," Transferee Judges Systematically Make Incorrect Rulings On Section 1404(a) Motions Is Both Unsupported By The Record And Simply Incorrect

Both Judge Kozinski and the petitioners assert that MDL transferee judges are systematically granting section 1404(a) motions and thereby transferring cases to themselves for purposes of trial and post-trial proceedings in cases in which such transfers are not justified under the standards of section 1404(a). Judge Kozinski, in his dissent below, accuses his fellow Article III judges of engaging in a "remarkable power grab, " J.A. at 57, by "twisting the standards of section 1404(a) beyond recognition," J.A. at 64 n.5, such that "the traditional forum deference afforded plaintiffs disappears entirely." J.A. at 71. According to Judge Kozinski, "self-transfers are not occasional, isolated events based on an unusually strong showing of judicial economy; they are the norm." J.A. at 72. "The simple reality," he claims, "is that once a case is sucked into the MDL vortex, it seldom comes back." *Id.* In a similar vein, petitioners contend that transferee judges will "often" order transfers for trial and post-trial purposes "that could not possibly be justified under the standards of section 1404." Pet. Br. at 24. Neither petitioners nor Judge Kozinski explain why this alleged power grabbing and standard twisting should occur, other than to suggest that transferee

judges "develop proprietary feelings toward the cases entrusted to them," J.A. at 58; Pet. Br. at 11.

In large part, the notion that transferee judges are "twisting" the standards of section 1404(a) is based upon a misunderstanding of what those standards actually are. As discussed above, Judge Kozinski and the petitioners give far too much weight to the asserted "right" of plaintiffs to have their cases tried in their chosen forum, and greatly understate the weight typically given to other interests -- including the interest of judicial economy -- in the consideration of section 1404(a) motions. Consolidating related cases under section 1404(a) is not an illegitimate "twisting" of section 1404(a) standards; rather, it is an entirely appropriate attempt to avoid "the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Continental Grain Co.*, 364 U.S. at 26.

But even though transferee judges may, in appropriate cases, apply the standards of section 1404(a) and consolidate related cases for trial and post-trial purposes, there is no evidence, as suggested by Judge Kozinski, that transferee judges are doing so routinely or otherwise exhibiting "proprietary feelings" towards the MDL cases assigned to them. To begin, it is worth noting that the JPML, which itself is designated by the Chief Justice, typically assigns MDL cases only to the most highly-respected and experienced district court judges. *See* Herr, *supra*, at 173 ("The Panel undoubtedly considers the ability and reputation of a judge in determining whether to assign complex, multidistrict litigation to him or her."). Thus, the MDL transferee judges come from the cream of the judicial crop. And like all judges, they are "presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990). Judge Kozinski's suggestion that the "proprietary feelings" allegedly harbored by these judges

leads them to systematically *mis*apply the law is, on its face, rather astonishing.

Judge Kozinski reveals the weakness of his "proprietary feelings" theory through reliance upon statistics which in fact demonstrate precisely the opposite of what he claims. He notes that the JPML "has transferred 92,562 cases for consolidated pretrial proceedings," but that "[o]nly 3,508 of these -- less than four percent -- have been sent back for trial in the district where the complaint was filed." J.A. at 57. It is these statistics, he contends, that "tell the story of a remarkable power grab by federal judges who have parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice." *Id.*[6]

When viewed in context, however, these figures show nothing of the kind. The relevant text of the *Judicial Business of the United States Courts: 1995 Report of the Director* at 32, the source of the statistics relied upon by Judge Kozinski, states as follows:

> Since the panel's creation in 1968, the panel has centralized 92,562 civil actions for pretrial proceedings. A total of 3,508 actions have been remanded for trial, 279 have been reassigned within the transferee districts, and 35,441 have been terminated in the transferee courts. On September 30, 1995, a total of

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6 Judge Kozinski's description of section 1407(a) as a "narrow grant of authority to conduct consolidated discovery" is itself an incorrect characterization of the scope of section 1407(a), a fact that he essentially admits later in his opinion by stating that "[i]t is true that an MDL court can dispose of the case by settlement or motion[.]" J.A. at 65.

53,334 actions were pending throughout 41 transferee district courts.

The 53,334 actions that remained pending in transferee courts as of September 30, 1995 were cases which had not yet been "terminated," i.e., they were cases that, for the most part, were still in pretrial proceedings, and therefore would not yet have been ripe for a remand to the transferor courts. *See id.* at 80, Table S-22. The only valid interpretation of these statistics is that, of the 39,228 "total terminations," 3,508 -- or almost 9 percent -- had been remanded to transferor courts for trial. But this obviously does *not* mean that the remaining 91 percent of MDL cases that were terminated in transferee courts did so because of a trial. "In reality, of course, cases gathered under Section 1407 hardly ever reach trial or return to their districts of initiation because most often they are settled in the transferee court." ALI, *Complex Litigation*, *supra* note 4, at 22. Indeed, the very same report relied upon by Judge Kozinski indicates that in 1995 only 3.2 percent of all civil cases terminated in the federal district courts reached trial, and that the remaining 96.8 percent of terminations occurred during pretrial proceedings. *Judicial Business of the United States Courts: 1995 Report of the Director* at 162, Table C-4. Thus, the fact that almost 9 percent of MDL cases were remanded to the transferor court for trial, when only 3.2 percent of *all* civil case ever reached the trial stage, indicates if anything that transferee courts *rarely* retain MDL cases for trial.[7]

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[7] Neither the yearly *Judicial Business of the United States Courts* reports nor any other available source provides precise statistics concerning how many or what percentage of MDL cases are actually tried by transferee judges, or what percentage of such trials take place as a result of the granting of a section 1404(a) motion (as opposed to pursuant to the parties' consent). Counsel for *amici* have been informed by the JPML Clerk's office that the JPML does not itself maintain such statistics.

The actual decisions of transferee courts and of the JPML also demonstrate that transferee courts do *not* routinely transfer cases to themselves for trial. Rather, transferee courts often voluntarily relinquish control of MDL cases back to transferor courts. *See, e.g., In re Taxable Municipal Bond Sec. Litig.*, MDL No. 863, 1995 WL 637822, at *2 (E.D. La. Oct. 30, 1995) (transferee judge concludes that "[his] role in the litigation has reached an end and that the goal of judicial economy, as well as the convenience of the parties and witnesses and the interests of justice, would best be served by transferring these few remaining claims back to the transferor districts both for ruling on dispositive pretrial motions and trial"); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, MDL No. 587, 1994 WL 114904 (E.D. Pa. Mar. 29, 1994) (granting plaintiffs' motion for a suggestion of remand to the JPML so that the issue of plaintiffs' damages could be tried before the transferor court); *In re A. H. Robins Co., "Dalkon Shield" IUD Prods. Liab. Litig.*, 505 F. Supp. 221, 221-22 (J.P.M.L. 1981) ("This litigation has grown to include over 971 actions of which about 300 have been settled and dismissed in the transferee district and approximately 441 have been remanded by the Panel to their respective transferor courts following receipt of suggestion of remand from Judge Theis [the transferee judge]."); *In re King Resources Co. Sec. Litig.*, 458 F. Supp. 220 (J.P.M.L. 1978) (upon transferee judge's suggestion of remand, JPML remands actions to transferor court).

Thus, both the statistical evidence and the reported cases demonstrate that transferee judges do not routinely exhibit any illegitimate "proprietary feelings" towards the

MDL cases assigned to them. Rather, at the conclusion of pretrial proceedings, transferee judges often send MDL cases back to the transferor courts in which they originally were filed. Neither Judge Kozinski nor the petitioners have pointed to any evidence to the contrary. Significantly, despite Judge Kozinski's contention that transferee courts have "twist[ed] the standards of section 1404(a) beyond recognition," J.A. at 64 n.5, neither he nor the petitioners have pointed to a single case -- other than the case presently before this Court -- in which a transferee judge allegedly misapplied the standards applicable to a section 1404(a) motion.

Accordingly, absolutely no evidence has been presented to this Court -- and none exists -- that, as petitioners contend, transferee judges "often" order transfers for trial and post-trial purposes "that could not possibly be justified under the standards of section 1404." Pet. Br. at 24. To the contrary, all of the evidence indicates that transferee courts do not display any illegitimate "proprietary feelings" towards the MDL cases they handle, and that they only transfer MDL cases to themselves under section 1404(a) for trial and post-trial purposes in a relatively few instances, and only when such transfers are in the "interest of justice."

CONCLUSION

The efficiency and fairness benefits of consolidation of complex multi-district litigation -- including consolidation for trial and post-trial purposes -- are clear and undisputed. These benefits are available under the MDL system as it has been implemented by the JPML and the transferee judges for the past 30 years, but would be undermined if transferee judges are not permitted to consider and rule upon section 1404(a) motions. The Article III judges who act as transferee judges are fully equipped to render fair and appropriate rulings on section 1404(a) motions, and are in the best position to reach the appropriate balance between plaintiffs' choice of forum and other relevant interests, including the interest of judicial economy. Accordingly, the decision below should be affirmed.

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